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SUPREME COURT OF THE UNITED STATES

Oct. Term 1956

No. [redacted] 196

ANGUS M. MacNEIL,

Petitioner,

v.

RALPH W. GRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Somerville, Mass.
Petitioner

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The Petitioner, Angus M. MacNeil, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in this case on March 25, 1958.

CITATIONS TO OPINIONS BELOW

The order of the Court of Appeals is not reported in any published reports so far as your Petitioner has been able to ascertain. The orders and opinion of the District Court are

reported in 158 F. Supp 16 and are shown on the record on paper 32 in the certified copy of the record filed herewith.

JURISDICTION

The mandate and orders of the Court of Appeals were entered on March 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. (1254, 1)

QUESTIONS PRESENTED

1. Whether the State Court lost jurisdiction of the case, under the circumstances as follows; Action was commenced by writ dated July 19, 1957 and duly served in hand upon the defendant on July 23, 1957 with process. On July 29, 1957 the defendant was served a copy of the declaration in hand. The case was entered in the Superior Court in accordance with its return date on the first Monday of October 1957. The declaration was offered for filing with the clerk of the Superior Court on July 29, 1957 and filed, under G.L. c. 231 section 12. The declaration was

later returned to the plaintiff by the office of the clerk claiming that it should not have been filed until the return date. Removal was had more than twenty days after service of the original writ and declaration. Motion for remand was filed timely. Denial of the motion for remand was duly objected to. Motion for vacation of said orders denying Remand were timely made and presented to the Court. These were denied and objection timely taken.

2. Whether or not, process in a Civil Action in a Court of the United States may be served contrary to statute in another jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Statute on Removal and Remand is U.S.C. Title 28, Sections 1446 and 1447. Copies of the relevant portions of said Statutes will be found in Appendix A.

2. The Law on limitation of effective service of process is found in Federal Rules of Civil Procedure Rule 4f. The law on arrest in a civil

action in a District Court of the United States is found at 28 U.S.C. 1693 a copy of which is in Appendix A.

STATEMENT OF THE CASE

The plaintiff was arrested by the United States Marshal, the defendant, for the District of Massachusetts in Somerville Massachusetts on a warrant issued in a civil case pending in the United States District Court for the District of New Hampshire. Action was instituted by the plaintiff in the Superior Court for the Commonwealth of Massachusetts, by writ dated in July 1957 and returnable to the Court in October 1957. On July 29, 1957 copy of the declaration was filed in the office of the Clerk of the Superior Court. Copy was delivered in hand to the defendant the same day. More than twenty days later, to wit; on October 8, 1957 the defendant filed his petition for removal to the District Court of the United States for the District of Massachusetts. The plaintiff moved for remand, which the court denied. Motion to vacate

later filed was also filed and denied. Appeals were duly claimed. Motion of the defendant on the said facts was granted by the District Court and appeals duly taken. Motion was made for extension of time for filing the bond on appeal and the Court of Appeals denied said motion and dismissed the appeals. Application for a certified copy of the record before that Court of Appeals was made to the office of its clerk and the application was denied. The said clerk supplied a copy of the proceedings filed herewith. Copy of the record was ordered from the clerk of the District Court and was received on July 18, 1958 in the form enclosed. The said record is missing in the returns of service and other matters shown on the reverse side of several of the filed papers.

REASONS FOR GRANTING THE WRIT

It is clearly apparent that the United States District Court for the District of Massachusetts is without jurisdiction of the case as is the entire federal system, for the reason of the limitation of

right of removal to the twenty days after receipt of the pleading setting forth the claim being made. The said pleading was delivered to the defendant on July 29, 1957. The attempted removal was made October 8, 1957. The Court was without jurisdiction and in accordance with U.S.C. title 28 section 1447(c) it could but remand the case to the State Court. This it did not do. But it had no jurisdiction to adjudicate either. "The Court is powerless to act if without jurisdiction," Concord Casualty and Surety Company v U.S. 69 F 2nd 78.

"District Courts are of limited jurisdiction conferred by the Constitution and laws of the United States and depending upon the express provisions of statute." Klein v Construction Co. 260 U.S. 226 and Hanford v Davies, 163 U.S.273.

It is of course well established that a Court lacking in jurisdiction must inquire into the fact and if it finds no jurisdiction it must refrain from adjudication of the merits. An appellate Court

must inquire into the jurisdiction of the lower court.

"The judgment or decree of a court that lacked jurisdiction will be reversed by an appellate court whenever the case is brought before it by any means possible in the particular case, whether appeal, exceptions, report, writ of error or bill of review." Assessors v Osbornes 9 Wall 567, 575; Alexander v Crollott, 199 U.S. 580; Piedmont & Northern Railway v United States, 280 U.S. 469, 478. Gully v Interstate Natural Gas Co. 292 U.S. 435, 440. The Course of dismissing the appeal without reversing the erroneous decree is not approved. Donnelly v Montague 305 Mass 19. It seems clear that the United States Courts had no jurisdiction of the merits of the case and the case should have been remanded. The Court of Appeals having received the case on appeal had but a single jurisdiction, namely to remand the case to the District Court with directions that it be remanded to the State

Courts. It had no jurisdiction to dismiss the appeals without remanding the case to the State Courts for the lack of jurisdiction was obvious under the statutes 28 U.S.C. 1446 and 1447.

2. The Courts further violated the statutes of the United States in allowing the motion for summary judgment in as much as the statutes prohibiting arrests in civil actions outside the jurisdiction of the Court issuing the warrant, were not respected. It is admitted the arrest was made on process in a civil case pending in New Hampshire and the arrest made in Massachusetts. Summary judgment was not in order in such case for the defendant. At least nominal damages were due and judgment should have been for the plaintiff after determination of amount of damages.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Angus M. MacNeil
547 Somerville Ave.
Somerville, Mass.

July 19, 1958

Appendix A

28 U.S.C. 1446 (a) (b).

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the District Court of the United States for the District and Division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal to gether with a copy of all processes, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28 U.S.C. 1447 (c)

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State Court. The State Court may thereupon proceed with such case.

28 U.S.C. 1693

Except as otherwise provided by Act of Congress, no person shall be arrested in one District for trial in another in any civil action in a district court.